Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd

COURT OF APPEAL (KUALA LUMPUR) – CIVIL APPEAL NO W-02-302 OF 1996

NH CHAN, ABU MANSOR AND MOKHTAR SIDIN JJCA

5 AUGUST 2003

Civil Procedure *— Trial — Affidavit — Trial by affidavit evidence — Close of submissions — Party admitting fresh evidence — Whether party ought to have been allowed to admit fresh evidence at this stage*

Evidence *— Affidavit — Affidavit evidence — Fresh or further evidence — Close of submissions — Party admitting fresh evidence — Whether party ought to have been allowed to admit fresh evidence at this stage*

Evidence *– Judicial notice — Charge action — Rate of interest charged by bank — Whether court ought to take judicial notice of base lending rate*

Land Law *— Charge — Order for sale — Cause to the contrary — Actual amount owed by chargor to chargee not stated in affidavit — Failure to comply with requirement fatal — Rules of the High Court 1980, O 83 r 3*

Land Law *— Charge — Order for sale — Variation of interest rate — Charge provided for variation of interest rate — Whether bank entitled to*

The borrower obtained certain credit facilities from the bank. The charge documents executed by the borrower provided, inter alia, that interest would be charged on the loan at 2% above the bank's base lending rate ('BLR'). However, the bank's BLR was nowhere stated in the charge documents and the borrower alleged that no notice of the BLR was given to the borrower. The borrower alleged that the bank had failed to correctly state the actual amount owed by the borrower to the bank. After the close of submissions by counsel for the borrower, the bank sought and obtained leave to file a further affidavit. The bank argued that the courts had always taken judicial notice as to the then existing BLR. The court found that the discrepancy in the amount owing, if any, was small and, in any event, favoured the borrower. The court overruled the borrower's objections and granted an order for sale. The borrower appealed.

Held, allowing the appeal and setting aside the order for sale:

(1) These proceedings were by way of affidavit evidence. When the parties began their submission, the admission of evidence by way of affidavit is deemed closed. Parties ought only to be allowed to submit on the evidence presented. It was a matter of

some surprise that the trial judge allowed an affidavit to be filed after the close of the borrower's submissions. However, since the affidavit was admitted as evidence, the appellate court had to consider it. The affidavit merely strengthened the contention of the borrower that the amount claimed for the purpose of the order for sale was not correct, as conceded by the bank (see p 422D–G, H–I).

(2) It did not matter that the amount claimed was less than the actual amount. The trial judge was of the view that the discrepancy was so small that it did not affect the order for sale. In an application for sale, the precise amount owing ought to be stated in the notice of demand. The borrower ought to be informed as to the actual figure he has to pay to redeem the property. Otherwise, if the borrower paid the amount (which in this case was less than the actual amount owing) the lender would still have a lien on the property for the balance (see p 422H–423A).

(3) The stated rate of interest of 15.5%pa was applicable to the first charge. When the bank applied for the order for sale the bank charged 16.5%. The bank apparently did not deny this. While the bank had the right, under the charge, to vary the rate of interest but, in order to do so, notice in writing must be given to the borrower. No such notice was given (see p 424B).

(4) The court was in no position to take judicial notice of the BLR as different banks had different BLR and, depending on the circumstances, the situation and the time, the BLR keeps changing. That is the reason for a variation clause in the charge instrument which permits a bank, at its own discretion, to vary the rate of interest. Where the interest rate is pegged at 2% above the BLR, this must necessarily mean that any variation would be a variation of the BLR. It was thus imperative for the bank to state the BLR applicable at the time when the charge instrument was executed. The bank failed to do this and the borrower was left in the dark as to the actual interest rate charged (see p 425E–G).

(5) The borrower had requested for particulars of the amount claimed and its computation. The bank failed to give the particulars and the computation but instead just gave one lump sum and stated that that was the interest. From the various affidavits, it was clear to us the lump sum said to be interest also included commission. Without the particulars being given it was difficult to determine which was interest and which was commission. Thus there was non-compliance with O 83 r 3 of the Rules of the High Court 1980 and this was fatal to an application for an order for sale (see p 426C–E).

A [**Bahasa Malaysia summary**

Peminjam telah mendapatkan kemudahan kredit daripada bank. Borang gadaian yang disempurnakan oleh peminjam memperuntukkan, antara lain, bahawa faedah dikenakan ke atas pinjaman pada kadar 2% melebihi kadar pinjaman asas bank ('KPA'). B Walau bagaimanapun KPA bank tidak dinyatakan dalam borang gadaian tersebut dan peminjam menyatakan bahawa tiada sebarang notis KPA telah diberikan kepada peminjam. Peminjam juga menyatakan bahawa bank gagal menyatakan jumlah sebenar yang perlu dibayar oleh peminjam kepada bank. Pada penhujung hujah oleh peguam bagi peminjam, bank memohon dan mendapatkan C kebenaran mahkamah untuk memfailkan afidavit lanjutan. Pihak bank menyatakan bahawa mahkamah lazimnya memberikan pengiktirafan kehakiman ke atas kadar KPA semasa. Mahkamah mendapati perbezaan dalam jumlah yang dituntut, jika ada, adalah kecil dan memihak kepada peminjam. Mahkamah telah mengenepikan bantahan peminjam dan memberikan perintah jual yang dipohon. D Peminjam telah merayu.

Diputuskan, membenarkan rayuan tersebut dan mengenepikan perintah jual:

E (1) Prosiding ini menerusi keterangan afidavit. Apabila sesuatu pihak memulakan hujahannya, pemberian keterangan menerusi afidavit dianggap telah tutup. Pihak hanya harus dibenarkan berhujah berasaskan keterangan yang dikemukakan. Adalah aneh hakim perbicaraan telah membenarkan afidavit difailkan setelah peminjam membuat hujahannya. Walau bagaimanapun, F memandangkan afidavit tersebut telah diterima sebagai keterangan, mahkamah rayuan harus menimbangkannya. Afidavit tersebut hanya memperkuatkan dakwaan peminjam bahawa jumlah yang dituntut bagi perintah jual adalah tidak betul, sepertimana diakui pihak bank (lihat ms 422D–G, H–I).

G (2) Adalah tidak penting bahawa jumlah yang dituntut adalah kurang daripada jumlah sebenar. Hakim perbicaraan berpendapat perbezaan adalah kecil sahaja dan tidak menjejaskan perintah jual. Dalam sesuatu permohonan bagi perintah jual, jumlah yang dituntut harus dinyatakan dengan tepat dalam notis tuntutan. Peminjam harus diberitahu jumlah sebenar beliau perlu H membayar bagi menebus hartanah tersebut. Sebaliknya, sekiranya peminjam membuat bayaran yang dituntut (yang dalam kes ini adalah kurang daripada jumlah hutang sebenarnya) peminjam dapat mengekalkan lien ke atas hartanah tersebut bagi baki pinjaman (lihat ms 422H–423A).

I (3) Kadar faedah 15.5%pa yang dinyatakan terpakai bagi gadaian pertama. Apabila bank memohon perintah jual, bank telah menuntut faedah pada kadar 16.5%. Pihak bank tidak menafikan

dakwaan ini. Walaupun bank berhak, di bawah gadaian tersebut, mengubah kadar faedah tetapi, bagi membuat sedemikian, notis bertulis harus diberikan kepada peminjam. Tiada sebarang notis sebegini telah diberikan (lihat ms 424B– C).

(4) Mahkamah tidak dapat memberi pengiktirafan kehakiman ke atas kadar KPA memandangkan setiap bank mempunyai kadar KPA tersendiri yang berubah mengikut keadaan, situasi dan masa. Itulah sebabnya wujud peruntukan dalam suratcara gadaian yang membenarkan sesuatu bank, atas budi bicaranya, membuat perubahan ke atas kadar faedahnya. Memandangkan yang kadar faedah ditetapkan pada tahap 2% melebihi KPA, ini mesti bermaksud bahawa sebarang perubahan adalah perubahan dalam KPA. Maka bank harus menyatakan kadar KPA yang berkuatkuasa semasa suratcara gadaian disempurnakan. Pihak bank gagal berbuat demikian dan peminjam tidak tahu kadar faedah sebenarnya yang dituntut (lihat ms 425E–G).

(5) Peminjam telah menuntut butiran bagi jumlah yang dituntut dan penghitungannya. Pihak bank gagal memberikan butiran dan hitungan tersebut tetapi telah memberikan satu jumlah sebagai faedah yang dituntut. Adalah jelas daripada keterangan yang diberikan bahawa jumlah yang dikatakan faedah ini termasuk komisen Tanpa butiran yang diberikan, sukar mengenalpasti yang mana faedah dan yang mana komisen. Maka A 83 k 3 Kaedah-Keadah Mahkamah Tinggi 1980 tidak dipatuhi dan ini membawa padah pada permohonan bagi perintah jual tersebut (lihat ms 426C–E).]

Notes

For cases on affidavits in trials, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 6394-6395.

For cases on affidavit evidence, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 207-212.

For cases on judicial notice in charge actions, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), para 1664.

For cases on orders for sale, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 1939-2020.

Cases referred to

Asia Commercial Finance (M) Bhd v *Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283 (refd)

Bank Pertanian Malaysia v Zainal Abidin bin Kassim & Anor [1995] 2 MLJ 537 (refd)

Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608 (refd)

Maimunah bte Megat Montak v Mayban Finance Bhd [1996] 2 MLJ 422 (refd)

Legislation referred to

National Land Code 1965 s 16D
Rules of the High Court 1980 O 83, r 3, (3)

Mahinder Singh Dulku (*Harjit Singh* with him) (*Harjit Singh Sangay & Co*) for the appellant.

Yoong Sin Min (*Michele K Lira* with her) (*Shook Lin & Bok*) for the respondent.

Appeal from: Summons in Chambers No 24(31)-187 Tahun 1987 (High Court, Kuala Lumpur)

Mokhtar Sidin JCA (delivering judgment of the court): We have allowed the appeal earlier whereby we ordered that the order for sale dated 15 October 1987 be set aside. Now we give our reasons for doing so.

The appellant filed an application by way of summons in chambers to set aside the order for sale granted by the High Court on 15 October 1987. The summons in chambers was dated 26 August 1992. That application was supported by an affidavit affirmed on 22 August 1992 by Mr Tan Chong Keat on behalf of the appellant: The relevant paragraphs in the affidavit are:

> 4 For the purpose of this application, I crave leave to refer to the order for sale granted by this honourable court on 15 October 1987 wherein the plaintiffs are claiming for the sum of $55,488,823.63 as at 15 October 1987, a copy of the said order is annexed herewith marked as exh 'A'.
>
> 5 At the time the order was granted, the defendant company's representative nor their solicitors, Messrs Choo Yeang & Company, was not present and the order for sale was made in our absence.
>
> 6 We have since engaged Messrs Harjit Singh Sangay & Company.
>
> 7 I also crave leave of this honourable court to refer to the notice of default issued against the defendant pursuant to s 254 of the National Land Code and state that the notice is bad in law, null and void as the plaintiff has not specified the exact figure in that the overdraft in the notice is for the sum of $10,000,000 when in actual fact, the overdraft should be $38,000,000.
>
> 8 As a matter of fact, this proceedings involves a bankers guarantee which is $28,000,000.
>
> 9 I annex a copy of the notice of default as exh 'B' which states that the overdraft is for the sum of $10,000,000 whereas the plaintiffs own letters of offer, marked as exhs 'C' and 'D', clearly show the overdraft facility is for the sum of $38,000,000.
>
> 10 I verily believe that the sum claimed by the plaintiff is incorrect, thus making the calculation on the interest sum also incorrect. I state and state to this honourable court that the whole figure claimed by the plaintiff is incorrect.

On 23 February 1993, Mr Tan Chong Keat affirmed a further affidavit for which the relevant paragraphs are: A

4 In this respect, I crave leave of this honourable court to cross refer to a civil suit taken out by the plaintiff against the defendant, Lum Choon Realty Sdn Bhd at the Kuala Lumpur High Court vide Suit No C2-22(23)-4260-86 on 12 December 1986, a copy of the writ of summons and amended statement of claim are annexed herewith marked as exhs 'A' and 'B' respectively. B

5 In the civil suit, under para 3 thereof, the plaintiff alleged that the defendant was granted an overdraft facility of $10,000,000 and a bankers' guarantee facility of $28,000,000, thus totalling the two banking facilities at $38,000,000. C

6 Under para 11 of the amended statement of claim, the plaintiff is claiming for the sum of $47,884,178.68 as at 26 November 1986 together with interest thereon at the rate of 16.5%pa on monthly rests basis from 27 November 1986 until full payment.

7 Subsequently, judgment was obtained against Lum Choon Realty Sdn Bhdand three others on 19 March 1987 for the alleged sum of $47,884,178.68 as at 26 November 1986, a copy of the judgment is annexed herewith marked as exh 'C'. D

8 After a lengthy and tedious hearing of the defendants' application (including Lum Choon Realty Sdn Bhd) finally the judgment against the first defendant (Lum Choon Realty Sdn Bhd), third and fourth defendants were set aside on 19 February 1990 before the senior assistant registrar while the judgment against the second defendant was also set aside before the honourable Mr Justice Dato' Dr Zakaria. E

9 I annex herewith a copy of the order granted by this honourable court on 19 February 1990 as exh 'D'. F

10 Thereafter, the plaintiff filed an appeal to the Supreme Court whereby the appeal was heard on 1 September 1992 and accordingly dismissed with costs.

11 The judgment was set aside ex debito justitae on the grounds of two letters of offers written by the plaintiff themselves, addressed to the defendant. I annex herewith the said two letters as exhibits 'E' and 'F' respectively. G

12 In the first letter of offer dated 10 June 1982 ('the first letter'), the defendant was granted a banking facility of $10,000,000.

13 In the second letter of offer dated 7 July 1983 ('the second letter'), the defendant was granted banking facilities of $38,000,000 ie bridging loan of $10,000,000 and a bank guarantee of $28,000,000. H

14 In the second letter at p 3 under para 8 thereof in the heading of 'Other Conditions', it is clearly stated that if the second letter of offer is accepted, the same will cancel and supersede the first letter of offer dated 10 June 1982 issued by the Butterworth branch for the bridging loan of $10,000,000. I

I reiterate the words '... This letter of offer if accepted will cancel and

supersede the letter of offer dated 10 June 1982 issued by our Butterworth Branch for the bridging loan of $10m ...'.

The said paragraph which I refer thereto, is highlighted for easy reference.

15 Further, I crave leave of this honourable court to refer to the notice of default issued pursuant to s 254 of the National Land Code on 8 December 1986, a copy of which is marked as exh 'G', and state that the banking facilities ie overdraft for the sum of $1,000,000 and two bank guarantee facilities for the sum of US$6,000,000 and M$14,000,000. In this regard, I state that the figures stated in the notice of default are incorrect compared to the amended statement of claim and the second letter of offer.

16 Moreover in the amended statement of claim and the second letter of offer, the plaintiff has stated that the banking facilities are in Malaysian Ringgit and not US Dollar and there is only a bank guarantee for the sum of M$28,000,000 whereas in the notice of default, there seems to be two bank guarantees in two currencies ie US$6,000,000 and M$14,000,000.

17 To further support the facts raised by me, I would also crave leave of this honourable court to refer to the two charges and annexures prepared by the plaintiff, marked as 'H' and 'T' respectively, which clearly show that the first charge is for the sum of $10,000,000 while the second charge is for the sum of $30,000,000.

18 From the exhibits produced and shown in this affidavit, I dispute and dispute strongly the sum claimed by the plaintiff. I summarize my contention on the banking facilities, which are different, incorrect and confusing to this honourable court:

(a) second letter of offer - $10,000,000 and $28,000,000.

(b) first charge and annexure - $10,000,000

second charge and annexure - $30,000,000.

(c) notice of default - $10,000,000 (overdraft), US$6,000,000 and M$14,000,000 (bank guarantees).

19 I would also like to draw this honourable court's attention to the base lending rate charged by the plaintiff against the defendant, of which I dispute and have no knowledge thereof.

20 In the second letter of offer (exh 'F'), under para 4 thereof, it is stated that 2% above the base lending rate of 2% above three (3) of six (6) months' costs of funds, whichever is higher.

21 I state and state that the plaintiff did not inform the defendant in their second letter of offer (since the first letter is cancelled) the base lending rate (referred as 'BLR') chargeable and it is nowhere stated in the annexure as well.

22 In this regard, I humbly crave leave of this honourable court to refer to p 3 of the second annexure wherein it is stated ' .... at the rate of two per cent (2%) per annum above the base lending rate of the bank .... '.

No BLR is inserted in the annexure.

The said wordings are highlighted for easy reference.

23 Even if the plaintiff is correct to charge 6% above the BLR at the notice of default (denied), I would like to inform this honourable court that the rate chargeable is incorrect as the second letter of offer and annexure clearly state 2% above the BLR. Thus, based on the contractual rate between both parties, the BLR should be charged if at all at 2% above the BLR and not as stated in the notice of default.

24 In particular, I would like to further inform this honourable court at the time the order for sale was granted, our then solicitors, Messrs Choo Yeang & Company, had not attended court on our behalf, though our company had accordingly requested them to attend court on our behalf and not informed us of the outcome subsequently, thus resulting in the order of sale being granted and after the appointment of our new solicitors, Messrs Harjit Singh Sangay & Company, and upon discussion with our solicitors, I have discovered that there are merits to set aside the said order and several issues to be determined by this honourable court, in particular the banking facilities, interest rates and BLR.

The respondent's reply to the two affidavits was affirmed on 8 April 1993 by Mr Tan Kwe Hee, the deputy general manager, loan administration of the respondent. The relevant paragraphs of the affidavit are as follows:

4 I refer to paras 4 and 5 of the defendants' first affidavit and para 24 of the defendant's second affidavit. In this respect, I wish to state that the defendant was represented by solicitors at all material times and its solicitors were aware of the hearing of the plaintiff's application for an order for sale on 15 October 1987. However no affidavit in reply to the plaintiff's application was filed by the defendant and neither the defendant not its solicitors appeared in court on 15 October 1987. As such an order for sale was granted and a copy of the same has been exhibited in the defendant's first affidavit as exh 'A'.

5 By reason of the aforesaid, I am advised by the plaintiff's solicitors and verily believe that the defendant and its solicitors by being absent at the said hearing, tacitly consented to the plaintiff's application for an order for sale and is now estopped and/or precluded from applying to set aside the same.

6 Further, I am advised and verily believe that this honourable court having granted the said order for sale no longer has the jurisdiction to set aside the said order.

7 In any event, even if the court has jurisdiction to set aside the order for sale, which is denied, I am to state that the court ought not to set aside the said order for the following reasons:

(a) The order for sale was granted in 1987, ie a period of almost six years ago. In that time, the defendant did not make any attempt to set aside the said order for sale nor to appeal against the same, nor to attend the hearing of the summons for directions dated 17 December 1987, which came up for hearing on 15 January 1983, wherein an auction date and reserve price were fixed. By reason of this inaction and

excessive delay on the part of the defendant, the defendant's application herein would seriously prejudice the plaintiff if allowed by this honourable court.

(b) Over and above the aforesaid, the defendant has not shown any grounds which would justify the setting aside of the order for sale at this late stage. In this respect, I refer to paras 7 to 10 of the defendant's first affidavit and paras 4 to 23 of the defendant's second affidavit and state that the issues raised therein are not relevant to this present application. They pertain to matters which ought to have been considered at the hearing of the plaintiff's application for an order for sale. These issues, could and should have been raised at the said hearing and the defendant having chosen not to do so is now estopped from raising the same.

8 In any event, paras 7 to 10 of the defendant's first affidavit are wholly denied and I am to state that the notice of default (Form 16D) issued against the defendant demanding for the sum of $47,884,178.68 as at 26 November 1986 was correct in all respects. Further, the plaintiff will show that the statements in the said Form 16D reflect accurately the facilities granted to the defendant and secured by the charges created by the defendant in favour of the plaintiff.

9 With respect to paras 4 to 23 of the defendant's second affidavit, I reiterate para 7(ii) above. However, I am to clarify the following.

10 In respect of the civil suit mentioned by the defendant in paras 4-10 of the defendant's second affidavit, I wish to state that there is no relevance thereof to the present action. The said civil suit was commenced by the plaintiff against the defendant herein and three others, who were sued as guarantors. On 19 March 1987, judgment in default was entered against all the defendants, including the defendant herein.

11 The second defendant in the said civil suit, applied to set aside the judgment in default, which application was allowed by the honourable Mr Justice Dato' Dr Zakaria and upheld by the Supreme Court on 1 September 1992.

12 However, this Supreme Court decision was only in respect of the second defendant's application and the basis on which the learned High Court judge and the Supreme Court set aside the judgment in default was that the second defendant was a guarantor whose liability was limited to $10,000,000 exclusive of interest and charges, whereas the claim made against him was $14,149,979.35. No particulars were furnished in the inherent of claim showing how the sum of $14,149,979.35 was arrived at.

13 I am advised and humbly submit that the abovesaid decision of the Supreme Court vis-a-vis the guarantor therein, is of no relevance here, where the defendant is the principal borrower who has executed valid, registered charges in favour of the plaintiff.

14. Insofar as the defendant herein was concerned, although the judgment in default against it was set aside by the senior assistant registrar on 19 February 1990, as shown by the defendant in para 9 of the defendant's

second affidavit, the said decision is pending appeal and in any event has no relevance to the present action where the plaintiff's rights derive from the valid and registered charges executed by the defendant in favour of the plaintiff.

15 In relation to paras 11-18 of the defendant's second affidavit, I again state that those are issues which could and should have been brought up for the hearing of the plaintiff's application for an order for sale. Having failed to do so, the defendant is estopped from raising the same. In any event, the plaintiff submits that if the letter of offer dated 10 June 1982 and 7 July 1983 are read together with the charges dated 6 August 1982 and 1 November 1983, there is no confusion or inconsistency as alleged by the defendant. The plaintiff will show this honourable court that the contents of the said letter of offer and the charges are accurately reflected in the notice of default (Form 16D) and that the sum claimed is correct in all respects.

16 I refer to paras 19 to 22 of the defendant's second affidavit. It is common knowledge that the BLR referred to by the defendant is the BLR of the plaintiff bank and the court has always given judicial notice to this fact.

17 Finally, I refer to para 23 of the defendant's second affidavit. The plaintiff and defendant contractually agreed in the letters of offer and charges annexures that the plaintiff was entitled to vary the rate of interest from time to time, and as such the rate of interest charged, ie 6% above the BLR was pursuant to such agreement. As the said rate was never challenged by the defendant at the hearing for the order for sale, the defendant is estopped and/or precluded from now challenging the same.

On 22 September 1993, Mr Tan Chong Keat affirmed another affidavit. The relevant paragraphs are as follows:

11 In the premises, I would like to raise the issue as regard to the two letters of offer dated 10 June 1982 and 2 July 1983 respectively. The contents of the two letters of offer, in particular the second letter of offer dated 2 July 1983, are most vital for the defendant to set aside the order for sale and also to argue its case and respectfully crave leave of this honourable court to consider all the important and triable issues raised by the defendant thus far, bearing in mind that the plaintiff has failed to reply satisfactorily and/or produce concrete proof in the Tan affidavit to show otherwise.

12 I have also informed this honourable court as to the dispute in the BLR as well as other interest rate and its stipulation, which were done by the plaintiff, in my affidavit affirmed on 23 February 1993 and reiterate my averments contained therein.

16 In reply to para 15 of the Tan affidavit, I deny dispute to the plaintiff's statement. The contents of the second letter of offer is self-explanatory and it is clearly stated that if the second letter of offer is accepted, the same will cancel and supersede the first letter of offer dated 10 June 1982 issued by the Butterworth branch for the bridging loan of $10,000,000.

17 From the plaintiff's own letters of offer dated 10 June 1982 and 7 July 1983, there are several triable issues which need to be determined by this honourable court and I would state the confusion and inconsistency originated from the plaintiff themselves.

A

18 In the premises, I would like to inform this honourable court that the defendant's application to set aside the order for sale has merits and several important and triable issues which should be determined by this honourable court, coupled with the fact that I have produced and shown to this honourable court all the evidence and documents which support the defendant's contention.

B

This was followed up by another affidavit affirmed on 22 September 1983 by Mr Tan Chong Keat where the relevant paragraphs are as follows:

4 Further, I would like to inform this honourable court that the amount stated by the plaintiffs' affidavits to be owing from the defendant did not correspond with the amount owing as at the date of the affidavit.

C

5 I hereby crave leave to refer to encl 2 of the affidavit of Tan Kwe Hee affirmed on 10 January 1987 wherein the sum outstanding as in para 9 of the said affidavit contradicts with the affidavit affirmed by Kalvinder Kaur (encl 7) as compared to the notice.

D

6 Further, I verily believe and am advised by my solicitors that the amount outstanding is not as at the date of the issue of the originating summons and that the amount of a day's interest was also not stated at all.

On 18 October 1993, Mr Tan Chong Keat affirmed another affidavit for which the relevant paragraphs are as follows:

E

4 Further to my previous affidavits I would like to inform this honourable court the plaintiff has failed to comply with the mandatory requirement under O 83 r 3(3)(c) of the Rules of the High Court in this regard. I verily believe that the plaintiff did not provide the particulars of the amount of interest or instalments in arrears as at the date of issue of the originating summons and at the date of the affidavit ie on 10 January 1987.

F

5 In the plaintiff's affidavit affirmed by Tan Kwe Hee on 10 January 1987 (encl 2) the amount stated to be owing was $47,884,178.68 as at 6 November 1986 while the said affidavit was affirmed on 10 January 1987.

6 Consequently, the affidavit of Kalvinder Kaur was affirmed on 14 September 1987 and filed on 15 September 1987.

G

7 All the amounts stated by the plaintiff never corresponded with the requirement of O 83 r 3(3)(c) which requires the amount owing to be as the date of the said affidavits.

8 I would like to inform this honourable court that in all the affidavits filed by the plaintiff in support of this foreclosure proceedings, it is never stated therein the amount of a day's interest.

H

9 Based on the matters aforesaid, I verily believe that there are irregularities which would entitle the defendant to set aside the order for sale as of right ex debito justitiae.

I

In reply to those affidavits, Mr Tan Kwe Hee on behalf of the respondent, affirmed an affidavit dated 5 October 1993 where the relevant paragraphs are as follows:

4 I refer to paras 5 to 9 of the defendant's third affidavit. In this regard, I reiterate paras 4 and 5 of my previous affidavit affirmed on 8 April 1993 ('my first affidavit'). It is undisputed that the defendant, upon being served with the originating summons in this matter, did engage solicitors, who then entered an appearance on its behalf. The said memorandum of appearance dated 25 February 1987 is shown to me and a copy thereof is produced hereto and marked as exh 'PHB-1'.

5 Thereafter, the notice of appointment to hear the originating summons dated 9 April 1987 was served on the said solicitors by a letter dated 12 August 1987, a copy of which is enclosed herewith and marked as exhibit 'PHB-2'.

6 Despite the aforesaid, the defendant and/or his solicitors neither filed any affidavit in opposition to the originating summons, nor turned up on the hearing date.

7 As such, I once again state that the defendant is now precluded from setting aside the said order as the aforesaid facts tantamount to consent by the defendant to the making of the said order.

11 In relation to paras 4 to 6 of the defendant's fourth affidavit, I am advised by the plaintiff's solicitors and verily believe that the amounts stated in the affidavits of the plaintiff are correct and in accordance with the law.

12 My affidavit dated 10 January 1987, which is referred to in para 5, did state the amount due under the charge, as at 26 November 1986, which is $47,884,178.68. This is pursuant to the amount claimed by the plaintiff in its letter of demand dated 29 November 1986 to the defendant and in the Form 16D dated 8 December 1986.

13 Subsequently, as required by the Rules of the High Court, an affidavit affirmed by Kalvinder Kaur on 14 September 1987 stated the information required, including, inter alia, the amount due as at 15 October 1987, ie the date of the hearing of the Originating Summons. This figure, ie $55,488,823.63 coincides with the figure stated in the said order for sale.

By an affidavit affirmed by Mr Tan Chong Keat on 10 January 1994, the appellant denied that the amount owing as at 15 October 1984 was RM55,488,823.63. Mr Tan Chong Keat affirmed another affidavit on 6 May 1994 whereby a new point was raised by the appellant in that the respondent has no locus standi since it changed its name and the title of the application is in its old name. The learned judge found that there was no merit in that contention on the ground that the change was only in name but for all intents and purposes the respondent remained the same. We agree wholeheartedly with what had been expressed by the learned judge.

Mr Tan Chong Keat affirmed two more affidavits dated 26 May 1994 and 5 December 1994 and we are of the view that those affidavits are not relevant for the purpose of this appeal. On the other hand, Mr Tan Kwe Hee, on behalf of the respondent affirmed another affidavit dated 19 December 1994 which we also find not relevant for the purpose of this appeal.

From the record, Mr Tan Kwe Hee, on behalf of the respondent, affirmed another affidavit on 16 October 1995. This was done after the appellant's counsel closed his submission. The relevant parts are as follows:

> 4 I wish to clarify certain matters raised by the defendant's counsel in the course of his submission on 16 February 1995, in respect of which the court has on 26 September 1995 granted leave for this affidavit to be filed.
>
> 5 The defendant's counsel stated that no interest should be levied on the bank guarantee sums paid by the plaintiff in respect of the defendant's liabilities. I state that the plaintiff has a right under the land charges to levy interest on such sums. These bank guarantee sums, upon payment, were debited into the overdraft account of the defendant.
>
> 6 The defendant is also liable under the terms of charges for the payment of valuers' fees for the valuation of the charged lands and legal costs in connection with recovery of the money due from the defendant. These are the sums stated in para 4(d) of the said affidavit of Kalvinder Kaur of 14 September 1987.
>
> 7 The defendant's counsel had also queried para (e) of the plaintiff/their solicitors' letter of demand of 29 November 1986 (exh 'C' to the affidavit of Tan Kwe Hee of 10 January 1987) as regards the reference to the second land charge being security for the bank guarantee facility inclusive of RM2m to cover exchange risks.
>
> 8 1 wish to clarify that the RM28m bank guarantee facility granted to the defendant consisted of two bank guarantees issued at the defendant's request to lenders granting loans to the defendant. As known to the defendant, one bank guarantee was in respect of a RM14m loan granted to the defendant by a consortium of local lenders, and the other bank guarantee was in respect of a US$6m loan granted to the defendant by a consortium of foreign lenders. By reason of the fluctuation of the Ringgit - US Dollar exchange rate, the defendant had executed the second charge in respect of the bank guarantee and other banking facilities of RM30m to also secure any increase in the bank guarantee liability owing to, inter alia, an increase in the exchange rate. Having executed the said charge, the defendant cannot dispute this.
>
> 9 The defendant's counsel had referred to the affidavit of Kalvinder Kaur affirmed on 14 September 1987 and filed herein (encl 7) and queried the amount of advance stated as RM44,254,256.15. The sum advanced by the plaintiff was in fact made up of the following:
> OverdraftRM10,000,000.00
>
> Total amount including interest paid out under the plaintiff's bank guarantee to Elders Pica (Pte) Ltd, the agent for the consortium of foreign lenders of the US$6m loan granted to the defendant ('the Offshore Loan') RM15,987,193.11
>
> Total amount including interest paid out under the plaintiff's bank guarantee to

Pica (Malaysia) Sdn Bhd, the agent for the consortium of domestic lenders of a RM14m loan granted to the defendant ('the Domestic Loan')	RM17,419,440.11
Bank Guarantee facility Commission	RM 999,376.80
Total Advance	RM44,406,010.02

The aforesaid are all amounts secured by the defendant's charges. The amount of advance of RM44,254,256.15 stated in encl 7 is slightly erroneous as certain interest amounts paid out under the bank guarantees had been inadvertently excluded from the sum. However, the plaintiff will abide by the amount of advance as stated in encl 7 for the purpose of these proceedings.

10 I therefore state that the amount stated in the order for sale dated 15 October 1987 and in encl 7 is due and owing to the plaintiff by the defendant.

We were wondering how the respondent was allowed to file and use that affidavit. It is to be noted that the proceedings of this application are by way of affidavit evidence. As such in our view when the parties begin their submission the evidence by way of affidavits is deemed to be closed and the parties are only allowed to submit on the evidence as found in the various affidavits. Numerous affidavits have been filed by both parties, the first being the one affirmed on 22 August 1992 and the last one before the hearing was affirmed on 19 December 1994. The appellant's contention, from the very beginning, as can be seen from the various affidavits, was that there were discrepancies in the amount claimed by the respondent. From the first to the last affidavit there was a period of more than two years and as such we are of the view that the respondent had ample opportunity to rebut, confirm or correct the allegations in the affidavits of the appellant before the hearing of this application. From the record, it is clear to us that the disputed amount was based on the order for sale dated 15 October 1987, well before this application. It is obvious to us that the facts and figures were available to the respondents before this application was made. It is a matter of surprise to us when the learned judge allowed the affidavit affirmed on 16 October 1995 despite the objection by the appellant. In our view, the admission of that affidavit is highly irregular especially taking into consideration that it was done after the completion of the appellant's submission.

Since that affidavit has been admitted by the learned judge, we have to consider it. After perusing that affidavit, we are of the view that it is of no help to the respondent. On the other hand, it strengthened the contention of the appellant that the amount claimed for the purpose of the order for sale was not correct as conceded by the respondent. It does not matter that the amount claimed was less than the actual amount. In this respect, we find that the learned judge had erred when he viewed the concession by the appellant. The learned judge was of the view that the discrepancy was so

small that it did not affect the order for sale. With the greatest respect to the learned judge we are of the view that in an application for sale the precise amount should be stated in the notice of demand. The whole idea is to let the borrower know the actual figure he has got to pay in order to redeem the property. Otherwise when the borrower pays the amount (which in this case is less than the actual one) the lender will still have a lien on the property based on the balance.

Turning to the merits of the present appeal it was contended by the learned counsel for the appellant that the rate applicable to the charge as stated in the annexure to the charge was 15.5%. This is specified at pp 6 and 7 of the charge instrument (pp 165 to 167 of the record of appeal) which states:

> NOW THIS CHARGE WITNESSETH as follows:
>
> The Company hereby covenants with the Bank on demand in writing to the Company by the Bank forthwith to pay to the Bank all sums of money and liabilities whether certain or contingent which are now or shall from time to time or at any time hereafter be due or owing or incurred to the Bank from or by the Company anywhere on any current or other account or accounts or in any manner whatever whether as principal or surety and whether alone or jointly with any other persons firms or companies including the balance for the time being owing for or in respect of cheques bills notes drafts or other negotiable instruments accepted paid or discounted for or on behalf of the Company either alone or jointly with another or others or for any other payments loans credits or advances made to or for the use or accomodation or on behalf of the Company whether alone or jointly with another or others pursuant to or in respect of or under any guarantees or letter or credit given established or opened by the Bank for the Company or any contracts for the forward delivery of goods bills or specie or in respect of any other banking facilities whatsoever whether or not given upon or under any trust receipts or other security whatsoever or otherwise howsoever up to the extent of Malaysian Ringgit Ten Million (M$10,000,000) only for principal with such respective limits for particular facility as may be advised by the Bank to the Company from time to time but not exceeding for the facility the overall limit of Malaysian Ringgit Ten Million '(M$10,000,000) only together with interest thereon at the rate of 15.5% per annum in respect of the Banking facility may from time to time be fixed by the Bank (the said interest being compounded with monthly rests) and the banking charges and all costs charges and other expenses which the Bank may charge in respect of any of the matter aforesaid or which the Bank may pay or incur in registering this Charge or in perfecting the present security or in enforcing or obtaining payment of such monies and also all other payment and sums herein mentioned or stipulated and other usual bankers' charges and if when any of the said account or accounts current or otherwise shall be closed a balance shall be owing to the Bank by the Company, the Company will so long as the same or any part thereof shall remain owing pay interest thereon at the aforesaid rate with monthly rests computed from the time when such balance shall be ascer-

tained and the company agrees that the statement of a Manager, Assistant Manager, Sub-Manager, Pro-Manager, Accountant or any other Officer of the Bank as to the amount of such balance shall be final and conclusive. A

3 Notwithstanding the provisions relating to the rate of interest as hereinbefore provided the Bank shall be entitled at any time and from time to time to vary at its discretion such rate of interest (whether by increasing or reducing such rate) by serving a notice in writing on the Company of such its intention and such amended rate of interest shall be payable as from the date specified in the said notice.' B

The rate of interest stated was applicable to the first charge. From the above it is clear that the rate of interest applicable was 15.5%pa. It was contended by the appellant that when the respondent applied for the order for sale the rate imposed was 16.5%. The respondent apparently did not deny this. It was further contended by the learned counsel for the appellant that the respondent had the right to vary the rate of interest in accordance with para 3 but in order to do so notice in writing must be given to the appellant. No such notice had been given by the respondent to the appellant. C D

As to the second charge it is clear that the rate of interest chargeable was 2% above the BLR as stated in cl 3.01 (pp 196 and 197 of the record of appeal):

Section 3.01 Banking Facilities E

IN CONSIDERATION of the Bank having agreed at the request of the Chargor to grant to the Chargor the Banking Facilities up to the principal limit of Ringgit Thirty million ($30,000,000) the Chargor hereby undertakes that it will on demand pay to the Bank or its assign the balance which on the account or accounts current of the Chargor for the time being with the Bank shall be for the time being owing to the Bank by the Chargor whether in respect of moneys advanced or paid to or for the use of the Chargor or charges incurred on its account either actually or contingently or in respect of negotiable instruments drawn accepted or indorsed by or on behalf of the Chargor and discounted or paid or held by the Bank either at the Chargor's request or in the course of business or otherwise or in respect of moneys which the Chargor shall become liable to pay to the Bank in any manner whatsoever including moneys which the Bank may have been required to pay to any third party under any guarantee or letter of credit issued by the Bank at the request of the Chargor and moneys owing or liabilities incurred by the Chargor on contracts for the sale or purchase of goods bills or specie and whether any such moneys or liabilities shall be owing or incurred by the Chargor alone or jointly with any other person firm or corporation together with interest thereon at the rate of two per cent (2%) per annum above the base landing rate of the Bank from time to time or at such other rate as the Bank may at any time and from time to time in its sole discretion prescribe such rate of interest with monthly or other periodical rests commission and usual or customary bank charges and if and when the said current account or accounts shall be closed a balance shall be owing to the Bank the Chargor F G H I

A shall so long as the same or any part thereof shall remain owing pay to the Bank interest thereon at the same rate computed from the time when such balance shall have been ascertained ...

Variation of interest rate is provided for in Clause 3.04:

B Section 3.04 Variation of Interest Rate

Notwithstanding the provisions relating to the rate of interest as hereinafter provided, the Bank shall be entitled at any time and from time to time to vary at its discretion such rate of interest by serving a notice in writing on the Chargor of such its intention and such amended rate of interest shall be pay-
C able as from the date specified in the said notice. Service of such notice may be effected on the Chargor by ordinary prepaid post.

It was the contention of the appellant that the base lending rate is not stated anywhere in the charge instrument. We have seen the charge instrument as found in the record and we agreed with the appellant that nowhere it is
D stated the base lending rate in the charge instrument. Instead of pointing to us the relevant clauses, the respondent at para 16 of the affidavit affirmed on 8 April 1993 stated:

16 I refer to paras 19 - 22 of the defendant's second affidavit. It is common knowledge that the BLR referred to by the defendant is the Base Lending
E Rate of the plaintiff bank and the court has always given judicial notice to this fact.

With the greatest respect to the deponent of that affidavit the court is in no position to take judicial notice of that because we recognize the fact that different banks have different BLR depending on the circumstances, the
F situation and the time, where the BLR keeps changing. That is why the necessity for a variation clause in the charge instrument. It is clear to us that by cl 3.04 the respondent might at its own discretion vary the rate of interest. Since the interest rate under the second charge instrument was pegged at 2% above BLR it must necessarily mean that any variation made would be the variation of the BLR. As such it is imperative for the
G respondent to state the BLR applicable at the time when the charge instrument was executed. This the respondent failed to do and as such the appellant was left in the dark as to what was, actually the interest charged by the respondent. In the affidavit affirmed on 23 February 1993 it was stated at para 23:

H 23 Even if, the plaintiff is correct to charge 6% above the BLR at the notice of default (denied), I would like to inform this honourable court that the rate chargeable is incorrect as the second letter of offer and annexure clearly state 2% above the BLR. Thus, based on the contractual rate between both parties, the BLR should be charged if at all at 2% above the BLR and not as stated in the notice of default.

I There is no reply to this and in our view the failure to do so would mean that the respondent conceded that interest was computed at a rate higher than the one stated in the charge. It was the contention of the appellant that

no notice in writing was given to the appellant as to the variation of the rate of interest. The respondent did not reply to this and as such we take it as admitted. It was also the contention of the appellant that the notice of default did not state the particulars of the amount.

The respondent in the affidavit affirmed on 16 October 1995 admitted that the amount stated in the affidavit of Kalvinder Kaur in support of the application for the order for sale was not correct where it is stated:

> The aforesaid are all amounts secured by the defendant's charges. The amount of advance of RM44,254,256.15 stated in encl 7 is lightly erroneous as certain interest amounts paid out under the bank guarantees had been inadvertently excluded from the sum. However, the plaintiff will abide by the amount of advance as stated in encl 7 for the purpose of these proceedings.

From the record it is clear that the appellant had requested for particulars of the amount claimed and its computation. The respondent failed to give the particulars and the computation but instead just gave one lump sum and stated that that was the interest. From the various affidavits, it is clear to us the lump sum said to be interest also included commission. Without the particulars being given it would be difficult to determine which is interest and which is commission. It is also difficult to determine at what rate the interest was charged or any variation of rate applicable to the amount still remained unpaid. The appellant has every right to complain about it because the appellant is not sure whether the amount is correct or not. In our view, once the appellant requested for the particulars the respondent is obliged to give them and it is not difficult for the respondent to do so because the statements are with the respondent.

In view of the above, it is the contention of the appellant there was non-compliance of O 83 r 3 of the Rules of the High Court 1980 and this is fatal to the respondent's application for an order for sale. Order 83 r 3 of the Rules of the High Court provides:

> Action for possession or payment (O 83 r3)
>
> (1) The affidavit in support of the originating summons by which an action to which this rule applies is begun must comply with the following provisions of this rule.
> This rule applies to a charge action begun by originating summons in which the plaintiff is the chargee and claims delivery of possession or payment of moneys secured by the charge or both.
>
> (2) The affidavit must exhibit a true copy of the charge and the original charge or, in the case of a registered charge, the charge certificate must be produced at the hearing of the summons.
>
> (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of —
>
> (a) the amount of the advance;
>
> (b) the amount of the repayments;

A (c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and

(d) the amount remaining due under the charge.

B Subrules (4) to (7) are not relevant for the purpose of this appeal.

In *Asia Commercial Finance (M) Bhd* v *Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283, dealing with non-compliance of O 83 r 3(3), James Foong J, at p 287 stated—

C According to the defendants' counsel there are two further affidavits filed by the plaintiffs (encls 8 and 10 respectively) besides the first affidavit (encl 2) of the plaintiffs filed in support of their foreclosure application.

In the plaintiffs' first affidavit (encl 2), the amount stated to be owing
D was as at 25 April 1986 while this said affidavit was affirmed on 30 June 1986. This is in contravention to 0.83 r.3(3)(c) above where, the amount owing should be as at the date of issue of the originating summons for foreclosure which was 6 July 1986 and the date of the said affidavit which was 30 June 1986.

E Proceeding further, as submitted by the defendants' counsel, the subsequent affidavit (encl 8) was affirmed on 19 November 1986. However, in para 3 of this affidavit, the amount stated due and owing was calculated as at 24 November 1986.

Again, in the affidavit (encl 10) which was affirmed on 25 November
F 1986, the sum stated therein as due and owing by the defendants was RM1,565,884.66, calculated as at 1 December 1986.

All the amount stated never correspond with the requirement of O.83 r.3(3)(c) which requires that the amount owing should be as at the date of the said affidavits.

G Then further down at p 288 the learned judge stated:

The non-compliance with O 83 r 3(3)(c) and (7) of the Rules [Rules of the High Court 1980] in this case, deprives the defendants of the knowledge of the exact amount outstanding and interest due under the charge. This is fun-
H damental, as the charge of the defendants' property to the plaintiffs are related to loans granted to the defendants. The defendants must be offered every opportunity to repay the said loan before his property, which is only a security, is taken from him for good. This opportunity for repayment, as seen in s 266 of the National Land Code 1965, extends to 'any time before the conclusion of the sale' by public auction subsequent to an order of sale by the
I court. The non-disclosure to the defendants of the exact amount and interest due at relevant dates, is a failure to comply with statutory requirements that is so serious as to render an order so made therefrom to be set aside.

> I am in full agreement with Mr Justice Razak's decision in *Malayan Banking Bhd v Dagang Bina Sdn. Bhd* [[1991] 3 CLJ 1739] where an order for sale in a foreclosure proceeding was not allowed due to the failure of the plaintiffs' bank in complying with O 83 r 3(3) of the Rules, to disclose the amount of any interest or instalment in arrears at the date of issue of their originating summons and at the date of their affidavit.

Mohd Hishamuddin J expressed the same view in *Bank Pertanian Malaysia v Zainal Abidin bin Kassim & Anor* [1995] 2 MLJ 537 where at p 541 he stated:

> In my opinion, the failure to comply with rr 3(6) and 3(3), in particular, the failure to state:
>
> (a) the amount of the repayments; and
>
> (b) the amount of instalments in arrear,
>
> are serious omissions which warrant a dismissal of the action; for the absence of such pertinent information is highly prejudicial to the defendants. Especially so in the present case where, in view of the fact that the amount owing as alleged in the affidavit in encl 2 (RM48,766.52) is much lower than the amount of the loan (RM60,000), it is fair to infer that some repayments must have been made by the defendants. Fairness requires the chargee not only to state in the affidavit but also to state accurately the amount of repayments made and the amount of instalments in arrear. It hardly needs to be reiterated here that the purpose of the rule is also to protect the interest of the debtor/chargor.

The same sentiment was expressed by Mahadev Shankar J (as he then was) in *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608. In that case the defendant charger's land ('the said land') was charged to Citibank ('the plaintiff/chargee') as security for a loan by the chargee to the defendant and his brother. The chargee's solicitors gave written notice of default to the defendant on 30 April 1992, requiring payment of RM239,659.22 outstanding as at 31 March 1992 together with interest on the sum of RM233,264.37 at the rate of 14%pa from 1 April 1992 till date of final payment. As a result of the defendant's failure to comply with this letter, the chargee's solicitors served the defendant with the statutory notice under s 16D of the National Land Code 1965 ('NLC') for sale of the said land by public auction. An originating summons was subsequently filed by the chargee. The assistant manager of Citibank deposed an affidavit in support on 16 July 1992 ('the first affidavit'); however this affidavit did not state that correct amount of advance, the amount of repayment and the interest in arrears at the date of the issue of the originating summons. Another affidavit was filed on 15 December 1992 by the assistant manager ('the second affidavit') which made up for the omissions in the first affidavit. The scheduled hearing was adjourned as the defendant challenged the correctness of the amount claimed, and the interest calculation. Citibank filed a third affidavit on 15 February 1993, whereby a letter notifying the defendant of the variation of the interest rate to 2.25% above the BLR or

A 9.75% was also exhibited. A fourth affidavit was filed on 23 April 1993 where another itemization was given of the advance, less repayment, interest and legal costs. However, in this affidavit, it was stated that the money was owing by the defendant's brother.

The relevant clauses of the annexure to the charge was cl 2 (in relation B to payment of interest at 1.25% above the bank's lending rate or 8.25pa, whichever is the higher) and cl 22 (stating that the total amount recoverable under the charge shall not exceed RM224,000 only for principal together with interest accrued due). There was also a proviso which gave the chargee a right to recover the total sum owing and above the limit, independently of the charge and without regard to the limitation.

C Mahadev Shankar J explained the objective of O 83 of the Rules of the High Court when at p 611 he stated:

> A close reference to O 83 of the RHC [Rules of the High Court 1980] will be useful if the issues here are to be clearly understood.
>
> D Where O 83 r 3(3) applies, the affidavit must show the state of the account between the chargor and chargee with particulars of the amount of the advance, the repayments, the interest in arrears at the date of the issue of the originating summons and at the date of the affidavit and the amount remaining due under the charge. This rule applies where the plaintiff claims E delivery of possession. The particulars (aforesaid) are hereafter referred to as 'the statutory particulars'.
>
> Order 83 r 3(6) provides that where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in O 83 r 3(3). And by para F (7) if interest is claimed on the judgment, the affidavit must state the amount of a day's interest.
>
> From O 83 r 3(1), it would appear that 'the affidavit' referred to in the sub-rules of O 83 r 3 is the affidavit-in-support of the originating summons.

G Further down at pp 614-615 he went on to state:

> The remaining statutory particulars supplied do not show how the interest was really calculated or how Citibank became entitled to charge 14%pa and from what date.
>
> This is where the real difficulty is. In *Mary Michael v United Malayan* H *Banking Corp Bhd* [1971] 1 MLJ 172 there was a dispute as to the amount of the interest chargeable. The chargor contended that the bank was not entitled to charge increased interest and asked for an account to be taken to ascertain the present amount due. The bank's counsel conceded that only simple interest should be charged after the account was closed and did not object to the I taking of accounts.
>
> So the court ordered accounts to be taken on this basis to ascertain the correct amount due. In the present case, Mr Leong was unable to say when

the bank interest had been varied from 8.75% at inception to 14%pa on 1 April 1992, he submitted that the court should make an order for payment of interest at 8.25%pa and that the senior assistant registrar should be ordered to take accounts on this basis in order to determine what the amount due to the plaintiff should be. He said he could provide the calculations and leave the defendant to challenge the same.

With respect *Mary Michael's* case was decided long before the RHC [Rules of the High Court 1980] came into force. The objective of the present legislation is to enable the chargee to know at least by the date the originating summons is filed, what is the exact sum he is legally liable to pay. What has to be shown is the state of the account with the statutory particulars. If there is a dispute as to the amount payable, the court must be able to say precisely when making its order 'the total amount due to the chargee at the date on which the order is made'. These words are from s 257(1)(c) of the NLC and they are mandatory.

It is a well established rule of construction that unless the context specifically so excludes, words in the singular must include the plural. It is to be noted that O 83 r 3(3) gives the court the power to dispense with the statutory particulars 'in any case or class'. More than one affidavit can and is usually filed in this type of case because invariably the matter cannot be disposed of on the first return date (eg for non-service) and at least one further affidavit is always required to state the total amount due on the date of the order. Provided evidence of the correct amount due has been put before the final hearing, the Court has the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice will thereby result to the defendant.

...

As much as the verb 'must' appears in O 83 r (3)(a) so does the verb 'shall' appear in O 2 r 1 whereby the failure to comply with any of the RHC shall not nullify the proceedings. So one must ask oneself what the objective of Order 83 r 3(3) was. It is to tell the defendant how much precisely is being claimed so that he can make up his mind to contest or pay up.

Similarly, in the present appeal it has been shown to us that the interest claimed is based on the second charge. We agreed with the learned counsel for the appellant that when the second offer was made and accepted it was stated clearly that that offer would extinguish the first offer upon which the first charge was based and the first offer was of no consequence anymore. The second charge made it very clear that the rate of interest is 2% above BLR. As I had stated earlier, the rate of the BLR is not stated anywhere in the charge. As such, the appellant was left in the dark as to the actual rate of interest applicable. This was further confounded by the fact that in the amount claimed also included interest rate which had been varied. Secondly, the learned counsel for the appellant also contended that the respondent arbitrarily varied the interest rate from 15.5%pa to 16.5%pa when the respondent made the application for the order for sale. Nowhere in the affidavits of the respondent that the respondent had given notice in

writing of the variation as required by the charge instrument. As such it is clear to us that the respondent had not complied with O 83 r 3 of the Rules of the High Court.

The decision in *Citibank NA* v *Ibrahim bin Othman* was approved by the then Supreme Court in *Maimunah bte Megat Montak v Mayban Finance Bhd* [1996] 2 MLJ 422 where Edgar Joseph Jr FCJ (as he then was), delivering the judgment of the court, stated at p 424:

> We would add, that insofar as there was a conflict of judicial opinion, as to the applicability of the provisions of O 83 r 3 of the Rules of the High Court 1980, to an application for an order seeking enforcement of a charge registered under the Code [National Land Code], by way of an order for sale, as appeared from the judgments of Shankar J (as he then was) in *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 on the one hand, and Abdul Aziz bin Mohamad J. in *Perwira Affin Bank Bhd v Tan Tian Ser* [1995] 2 CLJ 133 on the other, we preferred the reasoning and conclusion of Shankar J.

We are of the view when the respondent applied for the order for sale, the respondent failed to comply with the provisions of O 83 r 3 of the Rules of the High Court. As such the order for sale dated 15 October 1987 is defective. The appeal is hereby allowed with costs here and the court below. The order of the learned judge dated 20 April 1996 is set aside and the order for sale dated 15 October 1987 is also set aside. The deposit is to be refunded to the appellant.

Appeal allowed and order for sale set aside.

Reported by Sivapragasam Kumaran